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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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—against—

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners——Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation and The Upjohn Company——respectfully pray that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, entered on February 15, 1972, denying petitioners' application for a writ of mandamus directing the Honorable Miles W. Lord, United States District Judge for the District of Minnesota, to disqualify himself from presiding over any further proceedings in this multidistrict, antitrust damage litigation.

Opinion Below

The opinion of the Court of Appeals has not been officially reported. It appears in the Appendix hereto (3a-30a). No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals denying petitioners' mandamus application (1a-2a) was entered on February 15, 1972. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

When a Court of Appeals concludes that a district judge, in the course of pretrial proceedings, has "shaken petitioners' confidence in his impartiality" and has caused the petitioners reasonably to believe that he "has improperly prejudged the case," may it nevertheless, despite the provisions of 28 U.S.C. § 144 and the due process guarantee of a fair and impartial tribunal, require petitioners to submit their cause for further pretrial and trial before that judge?

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section 144 of the Judicial Code, Title 28, provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Statement of the Case

The Court of Appeals found that the petition to disqualify Judge Lord presented "a close case" and that the "record adversely reflects upon Judge Lord's conduct" (29a). Although it concluded that Judge Lord has "shaken petitioners' confidence in his impartiality" and seems to have left "the impression that he has improperly prejudged the case" (29a), the Court of Appeals declined to order disqualification. Petitioners seek review by this Court of that decision.

1. *Background*

This petition arises out of events occurring in the course of coordinated pretrial proceedings in fifty-six antitrust damage actions which have been brought against five

pharmaceutical manufacturers (the petitioners) by a number of different categories of plaintiffs, including a large number of private entities, various state governments and the United States. The plaintiffs generally allege that all petitioners conspired to restrain trade and monopolize the market for broad spectrum antibiotic drug products and that, as a part of such conspiracy, certain of the petitioners made false and misleading statements to the Patent Office in prosecuting applications for an important product patent.

These actions and approximately one hundred others grew out of Federal Trade Commission proceedings instituted in 1958[1] and a criminal antitrust action brought by the United States in 1961.[2] At one time, all of the damage actions were coordinated for pretrial proceedings in the Southern District of New York before the Honorable Inzer B. Wyatt, with whose approval a majority of the cases were settled.[3]

Following Judge Wyatt's approval of the first large settlement, plaintiffs in these "non-settling" cases petitioned the Judicial Panel on Multidistrict Litigation for

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[1] *Matter of American Cyanamid Company, et al.*, Dkt. No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd sub nom. Chas. Pfizer & Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

[2] *United States v. Chas. Pfizer & Co.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2d Cir. 1970), *prior en banc hearing order vacated, opinion of panel modified and petition for rehearing denied*, 437 F.2d 957 (1970), *aff'd by equally divided court*, —— U.S. ——, 40 U.S.L.W. 3348 (Jan. 24, 1972).

[3] *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

a re-transfer of their cases under 28 U.S.C. § 1407 from the Southern District of New York to the District of Minnesota for the completion of coordinated pretrial proceedings. Although the Panel denied plaintiffs' motion as such, it did reassign the non-settling cases to Judge Lord of the District of Minnesota, who was specially assigned to the Southern District of New York. *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970). Subsequently, *sua sponte* and over petitioners' objections, Judge Lord transferred forty-nine of the cases to the District of Minnesota, for the completion of pretrial and for trial, pursuant to 28 U.S.C. § 1404(a). That action was approved by the Second Circuit Court of Appeals in *Pfizer Inc. v. The Hon. Miles W. Lord*, 447 F.2d 122 (2d Cir. 1971).

2. *The Proceedings Below*

On September 17, 1971, the petitioners, pursuant to 28 U.S.C. § 144, filed a formal application in the District Court requesting Judge Lord to recuse himself. The application was based on a series of incidents, recounted in affidavits submitted by petitioners and their counsel (31a-76a), which had convinced them that Judge Lord had prejudged the merits of these cases and had assumed the role of a prosecutor and advocate of plaintiffs' cause.

On September 20, 1971, Judge Lord denied petitioners' application "for legal insufficiency," without an opinion.

On October 13, 1971, the petitioners applied for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit, asking that court to direct Judge Lord to recuse himself. Judge Lord did not respond to the petition, but the plaintiffs-respondents filed lengthy opposing

briefs. After several months of deliberation, on February 15, 1972, the Court of Appeals issued a twenty-six page opinion denying the relief sought but taking the District Court to task for most of the events of which petitioners had complained.

3. *The Findings of the Court of Appeals*

After first determining that the petition should be considered on the merits, the Court of Appeals commented at length regarding the record, which it observed "adversely reflects upon Judge Lord's conduct during pretrial proceedings" (29a).

The court found that Judge Lord's "gratuitous and wholly extraneous" attack on the United States Patent Office as "'the sickest institution . . . ever invented'" was "totally injudicious." It said: "These words should not have been spoken, and we wholly disapprove of them."[4] (25a)

The court found that "[t]he record manifests Judge Lord's obvious perturbation over the contemplated settlement" of the civil suit brought by the United States government. "His words were strong." (24a) He "misconceived his role vis-a-vis the settlement" (24a), and he

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[4] Judge Lord not only asserted this strong personal belief "for the record and posterity," but he also characterized the Patent Office as "the weakest link in the competitive system in America" and asked the Antitrust Division to investigate "what is happening to the Patent Office" (50a). Because the propriety of certain petitioners' prosecution of antibiotic patents is a central issue in these antitrust cases, petitioners are convinced that Judge Lord's strong views would make it impossible for him to preside impartially.

"expressed his displeasure at having his 'game plan' upset" (22a).[5]

The court found that Judge Lord's threats to a witness at a deposition were "inappropriate" (17a), "prematurely made during pretrial proceedings and therefore unfair," and a "type of prejudgment."[6] (18a)

The court observed that while Judge Lord's remark, "'it would not bother me to find that lawyers were part of the conspiracy' does not directly cast any aspersions upon defense counsels' integrity, . . . [it] might be so interpreted" (29a n11).

"Because Judge Lord's conduct and comments may have discouraged settlements between the parties" (25a), the court deemed it necessary to admonish Judge Lord "not to impede any fair settlement of any of the cases presently before him" (27a).[7]

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[5] Judge Lord took aggressive steps to attempt to dissuade the Government from settling its action. Among other things, he suggested that, by settling, the Government would be permitting petitioners to "buy a monopoly," and threatened "another proceeding, or, at least some moves" against petitioners "to vindicate the integrity of the judicial system" for "the fraud committed on the court" (45a-46a, 48a).

[6] Judge Lord suggested openly that the witness was evasive and lying and threatened to fine the witness. After the deposition, Judge Lord stated his belief that the witness' testimony denying the charges of fraud was inherently incredible (38a-44a).

[7] Counsel for Hawaii proposed to settle with petitioners on the same basis as previously accepted by the attorneys general of forty-three states and approved by Judge Irizer B. Wyatt of the Southern District of New York and the Court of Appeals for the Second Circuit. In an *ex parte* telephone conference, Judge Lord advised counsel for Hawaii that the Court would refuse to approve that settlement or any settlement at that dollar level. The settlement offer was thereupon withdrawn. (51a-52a)

The Court of Appeals concluded that "[c]learly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality" (29a), and that he seems to have left "the impression that he has improperly prejudged the case" (29a). The court also found that petitioners had sought recusal in "sincerity and good faith" (29a).

Despite all these findings, the court concluded that "[t]he facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse" (28a).

Reasons for Granting the Writ

I

This petition raises the question whether the disqualification statute, 28 U.S.C. § 144, and the Constitution compel disqualification of a judge whose actions and conduct have created a clear appearance of bias and prejudice. The purpose of Congress in enacting 28 U.S.C. § 144, as confirmed by this Court in *Berger* v. *United States*, 255 U.S. 22 (1921), was to provide not only that the tribunals of the country shall be impartial in fact, but that they "shall give assurance that they are impartial." 255 U.S. at 36. Given the findings of the Court of Appeals, Judge Lord's conduct and statements, at the very least, created a substantial appearance of bias and consequently require his disqualification.

Due process grants all parties the unqualified right to have their controversies resolved before an impartial court. *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1927); *Jordan* v. *Massachusetts*, 225 U.S.

167, 176 (1912). The strength of the judicial system depends on the confidence of litigants and the general public that courts are exercising their important powers fairly and disinterestedly. "[J]ustice must satisfy the appearance of justice." *Offut* v. *United States*, 348 U.S. 11, 14 (1954); *Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1965).

In enacting 28 U.S.C. § 144, Congress supplemented and implemented this Constitutional guarantee by creating a procedure and remedy in advance of trial for a litigant with reason to believe that the judge to whom his cause is assigned is prejudiced against him. Representative Cullop of Indiana, chief sponsor of the legislation, made that purpose explicit when he declared:

> "I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him." 46 Cong. Rec. 306 (1910).
>
> "[T]his amendment is very essential, in my judgment, for the protection of the courts from criticism. . . . This amendment seeks to remove from the court[s] that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice . . ." 46 Cong. Rec. 2627 (1911).

In *Berger* v. *United States*, 255 U.S. 22 (1921), this Court's only comprehensive interpretation of the statute, the Congressional purpose was similarly described:

> "[I]ts solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are

> impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." 255 U.S. at 35-36.

Because the disqualification statute is directed at the appearance of bias, this Court in *Berger* held it improper for a judge, responding to a recusal petition, to conduct an inquiry into the accuracy and completeness of the allegations of bias in an effort to show that the litigant's apprehension of prejudice was mistaken and that the judge was in fact impartial. Rather, the requirement of an affidavit averring the facts and reasons in support of the conclusion of bias was included in the statute as "a precaution against abuse" rather than to submit "the reality and sufficiency of the facts . . . to the judgment of the judge." 255 U.S. at 33.

If the facts and reasons averred in the affidavit are "not frivolous or fanciful but substantial and formidable" and "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," recusal follows without more. *Id.* at 33-34.

II

Rather than disqualifying the judge when the affidavit demonstrates an appearance of bias on his part, however, many lower federal courts, including the Court of Appeals here, have misapprehended their task as including a review of the disqualification application on the merits to determine whether the judge will in fact ultimately be able to afford movants a fair trial. Such judicial efforts to determine whether bias in fact exists have unnecessarily put the honor and integrity of the challenged judge in issue.[8] The re-

[8] *Wolfson* v. *Palmieri*, 396 F.2d 121, 125 (2d Cir. 1968); *United States* v. *Parker*, 23 F.Supp. 880, 882-83 (D.N.J. 1938).

sulting inquiry has a demoralizing effect on both the trial judge and the appellate courts.[9] Because courts have been reluctant to disqualify a fellow judge, they have instead interpreted the statute narrowly and artificially to deny recusal.[10]

A number of lower courts have further strayed from the statutory standard by requiring litigants to prove that the asserted prejudice stems from an exclusively extrajudicial source.[11] In determining that petitioners' affidavits "fell short of showing the bias and prejudice needed to recuse," the Court of Appeals relied upon the proposition that an applicant must prove that the prejudice derived solely from exposure to something outside the case itself. For example, although the court below strongly disapproved of Judge Lord's "totally injudicious" remarks concerning the Patent Office (25a), it speculated that "even if . . . these comments disclose a prejudicial attitude concerning the Patent Office, these observations *may* have come as a result of Judge Lord's exposure to the prior proceedings" (25a, emphasis added) and therefore were insufficient to disqualify. This result is irreconcilable with *Berger* because it ignores the overriding concern that judges appearing to be prejudiced should be disqualified.

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[9] *Green* v. *Murphy*, 259 F.2d 573 (3d Cir. 1958); *United States* v. *McManus*, 298 F.Supp. 449, 457 (D. Iowa 1968).

[10] See *Cole* v. *Loew's Inc.*, 76 F.Supp. 872 (S.D. Cal. 1948), *aff'd*, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951); *Scott* v. *Beams*, 122 F.2d 777, 787, 788 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942); *Skirvin* v. *Mesta*, 141 F.2d 668, 672 (10th Cir. 1944); Orfield, *Recusation of Federal Judges*, 17 Buffalo L. Rev. 799, 805 (1968); Note, 47 Mich. L. Rev. 846 (1949).

[11] Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1447 (1966).

The court below drew support for its "extrajudicial" test from language in *United States* v. *Grinnell*, 384 U.S. 563 (1966). However, that case merely reaffirmed the time-tested rule that disqualifying bias under the statute may not be based upon a judge's rulings in the case, citing *Berger* v. *United States*, *supra*, 255 U.S. at 31, which in turn relied upon *Ex parte American Steel Barrel*, 230 U.S. 35, 43 (1913).[12]

Many lower courts have so stringently construed the "personal" requirement of the statute that neither bias against the litigant's cause nor a prejudgment of the merits of the controversy is sufficient to disqualify. Instead, they have required the litigant to demonstrate that the judge dislikes him as a person.[13] This concept may have found

[12] The limited nature of the rule restated in *Grinnell* is underscored by the unusual circumstance which confronted the Court in that case. At the insistence of the defendants, the trial judge in *Grinnell* had reviewed the Government's case in order to provide guidance to both sides as to the relief to be granted in the event the Government prevailed. Disturbed by the strong adverse views developed and stated by the trial judge as a result of that exercise, the defendants sought to have him recused pursuant to the statute. The Court affirmed the trial judge's refusal to recuse himself on the basis of the settled principle that the bias or prejudice which can be urged for disqualification must be based upon something other than rulings.

[13] *Cole* v. *Loew's Inc.*, 76 F.Supp. 872, 876 (S.D. Cal. 1948) "a personal attitude of enmity directed against the suitor making the application"; *Saunders* v. *Piggly Wiggly Corp.*, 1 F.2d 582, 584 (W.D. Tenn. 1924) "such personal dislike of a litigant as an individual or a party to the suit, or such a personal favoritism or regard for some opposite party"; *Price* v. *Johnston*, 125 F.2d 806, 811-12 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942); *Henry* v. *Speer*, 201 Fed. 869, 872 (5th Cir. 1913); *United States* v. *16,000 Acres of Land*, 49 F.Supp. 645 (D. Kan. 1942); *United States* v. *Valenti*, 120 F.Supp. 80 (D. N.J. 1954); *United States* v. *Gilbert*, 162 F.Supp. 384 (M.D. Pa. 1958); *Parker* v. *New England Oil Corp.*, 13 F.2d 497 (D. Mass. 1926); Schwartz, *Disqualification for*

its way into the rationale of the court below. Thus; despite Judge Lord's "strong" words and his "obvious perturbation" over the proposed settlement of the United States suit, the court did not consider his attitude to be of a disqualifying kind since "his ire seems directed not at petitioners but at the government. . . ." (24a) This ignores the crucial fact that his actions, particularly when viewed in the light of his strong views regarding the Patent Office, disclosed a "bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States, supra,* 255 U.S. at 34.

III

The effect of the development by lower federal courts of the artificial tests discussed above has been to eviscerate the disqualification statute by making it unavailable to litigants even where, as here, the trial judge clearly appears to be biased. The decision below demonstrates that such tests impose an impossible burden of proof on the party seeking to show bias, since he lacks the power to examine a judge and inquire into the genesis of his personal motives.[11] Nor would it be sound judicial policy to require a litigant to undertake such an investigation of a judge even if procedures were available for that purpose. Thus the practical effect of the restrictive tests applied by lower courts has been to limit the utility of the statute to those rare instances in which the trial judge himself discloses the

Bias in the Federal District Courts, 11 U. Pitt. L. Rev. 415, 417 (1950); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966).

[11] Recognition of this limitation provided a basis for decision in *Berger* v. *United States, supra*, 255 U.S. at 34.

source of his prejudice or overtly demonstrates his dislike of the litigant as a person.

Since the *Berger* decision is now more than fifty years old, and since lower courts have in the meantime strayed so far from the standards announced in that case, it is necessary that this Court now examine the subject of disqualification anew and, we respectfully submit, reaffirm *Berger* in clear and unequivocal terms. The need for such intervention by this Court to give effect to the disqualification statute has been frequently noted by legal commentators. Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. Pitt. L. Rev. 415, 418-20 (1950); Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 630 (1947); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966); Note, 47 Mich. L. Rev. 846 (1949).

This litigation in its present posture affords an unusually suitable vehicle to accomplish that purpose.

First, the Court of Appeals made detailed findings on the facts averred in petitioners' affidavits in support of their showing that Judge Lord is biased. It found ultimately, moreover, that "clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality," and that petitioners, in "sincerity and good faith," are under the "impression that he has prejudged the case" (29a). The comprehensive nature of these findings by the Court of Appeals presents a record permitting a clear restatement of the proper standards to be applied.

Second, since the litigation is in the pretrial stage, the question presented emerges in clear relief, unclouded by the many and diverse complex questions of fact and law

that will arise during trial on the merits and that inevitably will tend to obscure the question.[15]

Finally, this litigation poses extraordinary problems of judicial administration. It will require a substantial commitment of judicial resources for an extended period until disposed of. A number of important, often novel, questions of considerable interest to the public and to the bar alike are involved, including the series of legal questions presented by the enormous consumer class actions. In these circumstances, it is particularly appropriate for this Court to determine whether the litigation should remain in the control of a judge who, at the least, has created a clear appearance of bias and prejudice.

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[15] Moreover, as the United States, one of the plaintiff-respondents, observed in its answering papers before the Court of Appeals, interlocutory review of this question is peculiarly appropriate in the unique circumstances of this litigation:

> "[R]ather than leave such a serious charge unresolved throughout this lengthy litigation, the United States believes that the writ may properly be used here to review Judge Lord's denial of petitioners' motion." Answer of United States on Petition for Writ of Mandamus at 10 n2.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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